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Via Electronic Filing

May 21, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation – MB Docket No. 11-154

Dear Ms. Dortch:

This is to notify you that on May 17, 2012, Julie Kearney, Vice President, Regulatory Affairs, Consumer Electronics Association (“CEA”), and outside counsel William Maher and Natalie Roisman of Wilkinson Barker Knauer, LLP, met with Michelle Carey, Alison Neplokh, Mary Beth Murphy, Steven Broeckaert, Diana Sokolow, Jeffrey Neumann, and Walid Kassem of the Media Bureau and Karen Peltz Strauss, Rosaline Crawford, and Eliot Greenwald of the Consumer and Governmental Affairs Bureau. The purpose of the meeting was to discuss the petition for reconsideration of the *IP Captioning Order*¹ filed by CEA in the above-captioned proceeding.²

Consistent with the petition, CEA urged the Commission to (i) limit the applicability of the apparatus closed captioning rules to only those devices intended by the manufacturer to receive, play back, or record video programming, rather than broadly applying them to any device with a video player, (ii) reconsider the finding in the *IP Captioning Order* that standalone removable media players (e.g., Blu-ray Disc™ and DVD players) are covered by Section 79.103, and (iii) clarify that the January 1, 2014 compliance deadline refers specifically to the date of manufacture, so that only apparatus manufactured on or after that date are subject to the new rules, without affecting the importation, shipment, or sale in the United States of apparatus

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012) (“*IP Captioning Order*”).

² See CEA, Petition for Reconsideration, MB Docket No. 11-154 (filed Apr. 30, 2012) (“Petition”).

manufactured before that date. Limiting the rule to manufacture date would provide needed regulatory certainty and would not have the practical effect of exempting many products covered under the current rule language. To illustrate this point, CEA clarified that there typically is only a short lag time between manufacture and importation of any given apparatus. Indeed, the inventory cost to the manufacturer begins to accrue as soon as the product leaves the plant, so a manufacturer has every incentive to get its products to store shelves as quickly as possible following production. CEA is working with its members to provide the Commission staff with an estimate of the typical time interval between manufacture and importation.

To help guide the meeting, CEA provided attendees with the attached agenda that summarizes the items discussed and provides cross-references to the relevant portions of CEA's petition.

Pursuant to Section 1.1206 of the Commission's rules,³ this letter is being electronically filed with your office and a copy of this submission is being provided to the meeting attendees from the Commission. Please let the undersigned know if you have any questions regarding this filing.

Respectfully submitted,

/s/ **Julie M. Kearney**

Julie M. Kearney
Vice President, Regulatory Affairs

Attachment

cc: Michelle Carey
Alison Neplokh
Mary Beth Murphy
Steven Broeckaert
Diana Sokolow
Jeffrey Neumann
Walid Kassem
Karen Peltz Strauss
Rosaline Crawford
Eliot Greenwald

³ 47 C.F.R. § 1.1206.

CVAA – IP Closed Captioning Petition for Reconsideration
(MB Docket No. 11-154)
CEA *Ex Parte* Meeting Agenda

May 17, 2012

1. The Commission Should Narrow the Scope of Apparatus Covered by Section 79.103 to Apparatus “Designed” with “Video Programming” Players

- a. The *IP Captioning Order* does not give any practical effect to the “video programming” limitation in the text of the CVAA. (PFR at 4)
 - i. The *Order* concludes that *any* device “built with a video player” is “designed to receive or play back video programming transmitted simultaneously with sound” within the meaning of Section 203 of the CVAA and is therefore covered by the apparatus closed captioning rules. This is incorrect. (PFR at 4)
 - ii. It is possible to have a “video player” that does not receive or play back “video programming.” Congress did not intend such video players to be covered by the scope of the CVAA or the Commission’s implementing rules. (PFR at 3–5)
 - iii. Rather, Congress intended to limit the application of the apparatus closed captioning rules to a subset of video players, *i.e.*, only those players intended for receiving or playing back *video programming*, which the CVAA defines as “programming by, or generally considered comparable to programming provided by a television broadcast station.” Congress did not intend for the Commission to extend its captioning rules to all video players. (PFR at 4)
- b. The *IP Captioning Order* misinterprets the term “designed to” in Section 203 of the CVAA. (PFR at 5)
 - i. The unambiguous term “designed to” must be given its ordinary and widely-held meaning – *i.e.*, “to intend for a definite purpose.” (PFR at 5–6)
 - ii. However, Section 79.103(a) treats “designed to” as meaning “capable of” – a far broader reading than the plain language of the statute commands. The *Order* thus exceeds the scope of the CVAA. (PFR at 5–6)
 - iii. By equating the term “design” with the inclusion of a capability, the *IP Captioning Order* impermissibly removes the manufacturer’s intent – the hallmark of the term “design” – as a limitation on the scope of Section 79.103. (PFR at 6)

- c. Devices such as camcorders and digital still cameras aptly illustrate the over breadth of Section 79.103. (PFR at 4, 7)
 - i. Although not *designed* to receive or play back “video programming,” camcorders may be technically able to play back video programming. They thus could be covered under the current version of the rules, even though this clearly is not what Congress intended. (PFR at 7)
 - ii. Similarly, although about 92% of digital still cameras consumers buy today have video players, these devices are not meant to be used to play back video programming as defined by the CVAA. However, they could be covered under the current version of the rules, contrary to Congress’s intent. (PFR at 4)
- d. The inclusion of a waiver mechanism is insufficient to save or justify the overly broad scope of Section 79.103. (PFR at 7-8)
- e. The Commission should reconsider the *IP Captioning Order* and expressly limit the applicability of the closed captioning rules only to apparatus designed with “video programming” players. (PFR at 8)

2. The Apparatus Closed Captioning Rules Should Not Cover “Removable Media Players”

- a. Requiring removable media players to decode closed captions disserves the public interest, given (a) the costs involved, (b) the work underway to decode and display subtitles on removable media players, and (c) the fact that the removable media essential to operation of the players are not required to contain such captions. (PFR at 10)
 - i. Currently, removable media players routinely decode and display subtitles for the deaf and hard of hearing (“SDH”), which an increasing percentage of removable media includes to make video programming accessible to the deaf and hard of hearing. (PFR at 10)
 - ii. Thus, imposing the Section 79.103 closed captioning requirements on these players will provide minimal, if any, benefit to persons with disabilities, while causing substantial, unnecessary industry compliance costs. (PFR at 10)
- b. The *IP Captioning Order* inappropriately equates “transmitted simultaneously with sound” with a consumer’s playback of a disc or other removable media. This conflicts with the meaning of “transmitted” and is not supported in the CVAA. (PFR at 11)
 - i. The term “transmitted,” and the related terms “transmit” and “transmission,” are consistently used in the communications statutes to

describe how a signal is conveyed or sent over a *distance*, which is consistent with the common dictionary meaning of the term. (PFR at 11)

1. For instance, Section 2(a) of the Communications Act limits the applicability of the Act’s provisions to “interstate and foreign communication by wire or radio,” as well as “interstate and foreign transmission of energy by radio,” that “originates and/or is received within the United States.” (PFR at 11)
 2. Multiple sections of the CVAA use the term “transmitted” or “transmit” to mean to send out a signal over a distance, including Sections 2(a)(1), 106(c)(1), 201(e)(2)(F), and 202(a). (PFR at 12-13)
- ii. As now used in the *IP Captioning Order* with respect to removable media players, the term “transmit” does not square with Congress’s consistent use of the term, as implemented elsewhere by the Commission itself. (PFR at 13)
1. The *Video Description Order*, which implemented Section 202(a) of the CVAA, consistently treated the term “transmitted” as meaning sent over a distance by wire or radio and did not restrict it to a playback function. (PFR at 13)
 2. Also, when implementing the provisions of the CALM Act, which was passed just over two months after the CVAA, the *CALM Act Order* interpreted Congress’s use of the term “transmitted” to mean sending content over a distance from a broadcast station or MVPD to a consumer. (PFR at 13-14)
- iii. Congress understood the well-established meaning of “transmitted” and intended Section 203 of the CVAA to expand the coverage of the closed captioning rules to video programming delivered via IP, but did not extend the captioning requirements to removable media players. (PFR at 14)
1. As the *IP Captioning Order* recognizes, Section 203(a) of the CVAA amends Section 303(u) of the Act, which previously required caption decoder capability for “apparatus designed to receive television pictures broadcast simultaneously with sound,” by substituting the phrase “or play back video programming transmitted” for “television pictures broadcast.” (PFR at 14-15)
 2. Given the context provided by the CVAA, particularly in Section 202(b), Section 203’s amendment, contrary to the reasoning in the *IP Captioning Order*, was meant to extend the captioning requirements by expanding the scope of Section 303(u) of the Act beyond devices that receive broadcast television to devices that

play back captioned video programming delivered via the Internet. (PFR at 15)

3. This conclusion is confirmed by the fact that the CVAA does not extend the Section 79.103 closed captioning obligations to video programming provided on removable media, such as DVDs or Blu-ray Discs, which would be necessary for the deaf and hard-of-hearing community to benefit from the inclusion of closed captioning functionality in removable media players as specified in Section 79.103. (PFR at 15-16)

- c. The *IP Captioning Order*'s treatment of removable media players exceeds the Commission's authority. (PFR at 17-18)

- i. The Commission's general jurisdiction over interstate communications by wire or radio does not extend to the playback function of a consumer electronics device designed to play back content that is outside the scope of the Commission's authority. (PFR at 18)
- ii. Nor can the Commission properly exercise its ancillary jurisdiction to cover such apparatus. (PFR at 18)

3. Compliance Should Only be Required for Devices Manufactured on or after January 1, 2014

- a. The Commission should clarify that the compliance deadline refers specifically to the date of manufacture, so that only apparatus manufactured on or after January 1, 2014 are subject to the new rules, without affecting the importing, shipping, or sale of apparatus manufactured before that date. (PFR at 19)
 - i. Under Sections 79.103(a) and 79.104(a) of the new rules, the January 1, 2014 deadline expressly applies to apparatus "manufactured in the United States or imported for use in the United States." Without clarification, this phrase could be read as meaning that the apparatus closed captioning rules will apply based on date of importation, rather than date of manufacture. (PFR at 19-20)
 - ii. The requested clarification is consistent with the Commission's past practices regarding similar equipment compliance deadlines, including those for digital closed captioning, V-chip implementation, and analog captioning. (PFR at 20)
 - iii. Ambiguity surrounding the compliance deadline provides no consumer benefit and creates unnecessary compliance risks for manufacturers. Manufacturers can identify and control the date they manufacture apparatus. However, the date of importation is subject to variables outside the control of manufacturers. (PFR at 20)

- b. The Commission should add explanatory notes to Sections 79.103(a) and 79.104(a), as well as Sections 79.101(a)(2) and 79.102(a)(3), stating that the new obligations in those rule provisions “place no restriction on the importing, shipping or sale of apparatus that were manufactured before January 1, 2014.” This proposed language closely follows the relevant statutory language of the CVAA, as well as past FCC practice. (PFR at 21)